

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1199

To be argued by
RICHARD WEINBERG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1199

UNITED STATES OF AMERICA,

Appellee,

—v.—

ISHMAEL SUAREZ TORREZ and HECTOR PEREZ,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

RICHARD WEINBERG,
AUDREY STRAUSS,
*Assistant United States Attorneys,
Of Counsel.*

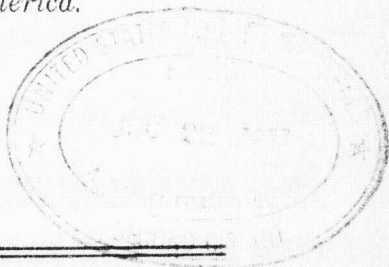


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	3
The Government's Case	3
A. Background and Synopsis	3
B. The Proof at Trial	5
The Defense Case	8
The Government's Rebuttal Case	8
ARGUMENT:	
POINT I—The Evidence Overwhelmingly Demonstrated the Defendants' Guilt	8
A. Defendant Torrez's Claim of Insufficiency Is Patently Without Merit	9
B. Perez's Claim of Insufficient Evidence to Establish His Unlawful Intent and Membership In the Conspiracy Is Similarly Without Merit	12
POINT II—The District Court Properly Admitted Similar Act Evidence	17
POINT III—The District Court's Instructions Were In All Respects Proper	20
CONCLUSION	23

TABLE OF CASES

<i>Glasser v. United States</i> , 315 U.S. 60 (1942)	9
<i>Henderson v. Kibbe</i> , — U.S. —, 45 U.S.L.W. 4457 (May 16, 1977)	20

	PAGE
<i>Morissette v. United States</i> , 342 U.S. 246 (1952) . . .	13
<i>Pinkerton v. United States</i> , 328 U.S. 640 (1946) . . .	16
<i>Screws v. United States</i> , 325 U.S. 91 (1945)	13
<i>United States v. Bianco</i> , 534 F.2d 501 (2d Cir. 1976)	21
<i>United States v. Chestnut</i> , 533 F.2d 40 (2d Cir. 1976)	17, 19
<i>United States v. Clark</i> , 475 F.2d 240 (2d Cir. 1973)	21
<i>United States v. Corr</i> , 543 F.2d 1042 (2d Cir. 1976)	16, 19
<i>United States v. Dixon</i> , 536 F.2d 1388 (2d Cir. 1976)	22
<i>United States v. Erb</i> , 543 F.2d 438 (2d Cir. 1976)	21
<i>United States v. Finkelstein</i> , 526 F.2d 517 (2d Cir. 1975), <i>cert. denied</i> , 425 U.S. 960 (1976)	16
<i>United States v. Frank</i> , 494 F.2d 145 (2d Cir.), <i>cert. denied</i> , 419 U.S. 828 (1974)	9
<i>United States v. Guillette</i> , 547 F.2d 743 (2d Cir. 1976)	20
<i>United States v. Hawley</i> , — F.2d —, Dkt. No. 76-1469, slip op. 3239 (2d Cir., April 27, 1977)	9
<i>United States v. Howard</i> , 506 F.2d 1131 (2d Cir. 1974)	22
<i>United States v. Indiviglio</i> , 352 F.2d 276 (2d Cir. 1965) (en banc), <i>cert. denied</i> , 383 U.S. 907 (1966)	21
<i>United States v. Leonard</i> , 524 F.2d 1076 (2d Cir. 1975), <i>cert. denied</i> , 425 U.S. 958 (1976)	9, 19
<i>United States v. Magnano</i> , 543 F.2d 431 (2d Cir. 1976)	20

	PAGE
<i>United States v. Martinez</i> , Dkt. No. 77-1041, slip op. 4315 (2d Cir. June 21, 1977)	21
<i>United States v. Murdock</i> , 290 U.S. 389 (1933)	13
<i>United States v. Natale</i> , 526 F.2d 1160 (2d Cir. 1975), <i>cert. denied</i> , 425 U.S. 950 (1976)	18
<i>United States v. Nemes</i> , — F.2d —, Dkt. No. 76-1584, slip op. 3509 (2d Cir. May 16, 1977)	20
<i>United States v. Papadakis</i> , 510 F.2d 287 (2d Cir.), <i>cert. denied</i> , 421 U.S. 950 (1975)	17
<i>United States v. Rapoport</i> , 545 F.2d 802 (2d Cir. 1976)	18
<i>United States v. Rosenwasser</i> , 550 F.2d 806 (2d Cir. 1977)	18
<i>United States v. Santiago</i> , 528 F.2d 1130 (2d Cir.), <i>cert. denied</i> , 425 U.S. 972 (1976)	19
<i>United States v. Simon</i> , 425 F.2d 796 (2d Cir. 1969), <i>cert. denied</i> , 397 U.S. 1006 (1970)	9
<i>United States v. Taylor</i> , 464 F.2d 240 (2d Cir. 1972)	9, 14
<i>United States v. Torres</i> , 519 F.2d 723 (2d Cir.), <i>cert. denied</i> , 423 U.S. 1019 (1975)	17
<i>United States v. Winston</i> , — F.2d —, Dkt. No. 76-1436, slip op. 4445 (2d Cir., June 23, 1977) ...	13

OTHER AUTHORITIES

Fed. R. Crim. P. 30	21
---------------------------	----

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1199

UNITED STATES OF AMERICA,

Appellee,

—v.—

ISHMAEL SUAREZ TORREZ and HECTOR PEREZ,
Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Ishmael Suarez Torrez, a/k/a "Eddie," and Hector Perez appeal from judgments of convictions entered on March 28, 1977 and March 25, 1977, respectively, in the United States District Court for the Southern District of New York, after a six day trial before the Honorable Inzer B. Wyatt, United States District Judge, and a jury.

Indictment 76 Cr. 1045 filed in November, 1976, charged Ishmael Suarez Torrez, Hector Perez, and ten other defendants with a conspiracy having the following objects: to defraud the United States, to violate the federal food stamp act, to steal and embezzle from the United States mails, to submit false statements to a department and agency of the United States, to submit false claims to a department and agency of the United States, and to embezzle and steal property of the United States. In addition, Indictment 76 Cr. 1045 charged each

defendant with substantive violations of the following statutes: Title 7, United States Code, Section 2023(b), the unlawful use, transfer, and possession of food stamp coupons in a manner not authorized by law; Title 18, United States Code Section 641, embezzlement and conversion of property and things of value of the United States and the United States Department of Agriculture; Title 18, United States Code, Section 287, the submission of false claims to a department and agency of the United States; and of Title 18, United States Code, Section 1001, the filing of false statements with a department and agency of the United States.

The trial of Torrez, Perez, and a third defendant, Carlos Fernandez, commenced on January 31, 1977. On February 8, 1977 the jury returned guilty verdicts with respect to Torrez and Perez on all counts that had been submitted to the jury.* The defendant Carlos Fernandez pleaded guilty to the conspiracy count during the trial. Of the remaining nine defendants, seven had pleaded guilty prior to trial to one or more of the offenses charged in Indictment 76 Cr. 1045; another defendant pleaded guilty to a superseding information, and the final defendant had been placed in a deferred prosecution program.

On March 25, 1977 Hector Perez was sentenced to three months in prison. On March 28, 1977 Ishmael Suarez Torrez was sentenced to three months in prison. Both defendants have served their terms of imprisonment.

* After the Government had rested, the court required the Government to elect between Count Six, which charged a violation of Title 18, United States Code, Section 287, and Count Nine, which charged a violation of Title 18, United States Code, Section 1001. The Government elected to proceed with Count Six and Judge Wyatt dismissed Count Nine. (Tr. 608). Thus, Torrez and Perez were each found guilty on Counts One, Two, Four and Six.

Statement of Facts

The Government's Case

A. Background and Synopsis

Under the federal food stamp program food retailers are permitted to become "authorized retailers." An authorized retailer is allowed to accept food stamp coupons from eligible recipients to whom they sell food or beverages. These authorized retailers may deposit the food stamp coupons into their bank accounts. (Tr. 123-25).^{*} The bank credits the retailer's bank account for the cash value of the food stamp coupons and sends the coupons through normal banking channels for payment by the United States Treasury.

Families eligible to use food stamp coupons receive "authorization to purchase" cards. In New York City the Department of Social Services is responsible for insuring that eligible families receive food stamp coupons. Accordingly, twice a month the New York City Department of Social Services mails to eligible households their "authorization to purchase" cards. The head of an eligible household presents the "authorization to purchase" card either to a bank or to a licensed check cashier.^{**} (Tr. 119-21). Pursuant to a contract with New York City, certain banks and licensed check cashiers receive food

^{*} References to the trial transcript and to Government exhibits are abbreviated as "Tr." and "GX" respectively.

^{**} The card contains two numbers. One number represents the cash requirement the recipient must pay to obtain his allotment of food stamp coupons. The other number is the value of food stamp coupons he is entitled to receive. The greater the household's income the more money the eligible household must pay to secure a specified value of food stamp coupons. (Tr. 123-25; GX 1(A), 1(B)).

stamp coupons and are supposed to provide eligible recipients with the food stamp coupons when the head of an eligible household presents a valid "authorization to purchase" card and a food stamp identification card. (Tr. 120-21).

The Government established that the defendants devised and perpetrated a fraudulent scheme in which approximately two million dollars worth of "authorization to purchase" cards intended for low income families were illegally redeemed at check cashing establishments which exchanged the cards for food stamp coupons. One defendant was an authorized retailer who accomplished this exchange through other defendants and co-conspirators who operated check-cashing establishments. Ultimately cash was obtained in exchange for the coupons and the resulting illicit profits were distributed among the co-conspirators.

The defendant Jose Rosado, a wholesaler and retailer of eggs, was an authorized retailer pursuant to the food stamp program. (Tr. 140-41). In slightly over a one year period of time, approximately two million dollars in food stamp coupons were deposited into Rosado's account. However, most of the coupons were illegally obtained by Rosado through the criminal involvement of his co-conspirators.

The defendant Modesto Diaz owned two licensed check cashiers. One establishment was operated by the defendant Ishmael Suarez Torres, and was located at 723 Burke Avenue, Bronx, New York. The other check cashier was operated by the defendant Hector Perez, and was located at 158th Street and Broadway, New York, New York. Over a one year period the defendant Jose Rosado redeemed literally thousands of stolen "authorization to purchase" cards at the check cashiers owned by

Diaz, and operated by Torrez and Perez. Rosado would deposit the food stamp coupons in his bank account, withdraw the cash and share the profits with his confederates. Rosado purchased the stolen cards from co-defendants Andreas Collazo and Joseph Rivera, and Rivera purchased the stolen cards from co-defendants Frank Cuevas and Jose Lobriel. In addition to redeeming the cards through Diaz, Torrez, and Perez, Rosado also redeemed stolen cards through two other check cashiers—co-defendants Carlos Fernandez and Joseph Comacho.

The Government established the existence of this conspiracy and Torrez's and Perez's knowing participation through the testimony of two major co-conspirators—Jose Rosado and Joseph Rivera. Their testimony was overwhelmingly corroborated through tape recordings, documents and the testimony of two agents with the United States Department of Agriculture.

B. The Proof At Trial

This massive conspiracy to defraud the United States Department of Agriculture food stamp program commenced in 1975 when Andres Collazo asked Rosado to convert stolen "authorization to purchase" cards into food stamp coupons in exchange for a share of the illicit profits. Rosado agreed to locate a check cashier willing to redeem the cards. (Tr. 144-45). Thereafter, Rosado negotiated an arrangement with Modesto Diaz, the owner of two check cashing establishments, one at 723 Burke Avenue, Bronx, New York, and one at 3796 Broadway, New York, New York. Pursuant to the arrangement Rosado would bring the stolen cards to one of Diaz's stores, present the cards for redemption, and pay Diaz four dollars for each stolen card Diaz redeemed. (Tr. 147-48).

Initially Diaz instructed Rosado to bring the stolen cards to the check cashier at Broadway and 158th Street. (Tr. 149-50). Hector Perez operated that establishment for Diaz. A regular pattern developed in which Rosado delivered the stolen cards he had obtained from Collazo and others to the check cashier operated by Perez. Perez determined the amount of cash Rosado had to pay for the food stamp coupons called for by the "authorization to purchase" cards. Rosado paid Perez that amount of cash, and Perez furnished Rosado with the food stamp coupons called for in the "authorization to purchase" cards. (Tr. 149-50).

After leaving Perez's check cashing establishment, Rosado stamped each food stamp coupon with his Department of Agriculture authorization number. Rosado completed the Department of Agriculture redemption certificate, and deposited the food stamp coupons into his bank account. (Tr. 152-53). Rosado left Diaz's share of the profits at a grocery store (Tr. 153), and Rosado gave to Perez \$20 to \$40 each time Perez redeemed the cards for him. (Tr. 193-94).

Since eligible recipients receive "authorization to purchase" cards twice a month, Rosado would deliver the stolen cards to Perez for redemption about every fifteen days. (Tr. 155; 177-78). Initially Rosado brought approximately one hundred cards to Perez (Tr. 154); the number increased to three hundred cards a cycle (Tr. 163); and in August, 1976, shortly before Rosado was arrested, he redeemed through Perez four to five hundred stolen cards at one time. (Tr. 188). Indeed as this investigation neared the end, Rosado delivered on one day approximately 750 stolen "authorization to purchase" cards directly to Perez. (Tr. 216).

Rosado's illicit business was not limited to Perez. After Rosado worked with Perez and Diaz for several months,

Diaz told Rosado to divide the stolen cards between the check cashier operated by Perez and another at 723 Burke Avenue, Bronx, New York. (Tr. 158). This check cashier was owned by Diaz, but operated on a daily basis by the co-defendant Ishmael Torrez. Rosado thus began to make two deliveries twice a month—one to Perez and one to Torrez.

The procedure with the defendant Torrez was similar to the one with Perez. Rosado delivered hundreds of stolen cards to Torrez, who would total the cash requirement for the cards, and the corresponding food stamp value. Rosado gave Torrez the cash requirement for the food stamp coupons along with thirty or forty dollars as payment to Torrez for redeeming the stolen cards. In return Torrez gave to Rosado thousands of dollars in food stamp coupons for Rosado to deposit into his bank account. (Tr. 161, 163, 170, 173, 176-77, 191, 204-05). At the end of this investigation, Rosado delivered to Torrez approximately 422 stolen cards at one time. (Tr. 515).

Perez and Torrez did not limit their dealings to Rosado. Each also accepted for redemption stolen "authorization to purchase" cards from co-defendant Joseph Rivera.* Indeed Torrez had dealt with Rivera prior to the time that Rivera made an arrangement with Torrez's employer, Modesto Diaz. (Tr. 422-29; 499). On several occasions Rivera redeemed stolen "authorization to purchase" cards through Torrez, paying Torrez three dollars for each card. (Tr. 422-25).

* Rivera not only redeemed stolen cards through Perez and Torrez, but he also regularly delivered to Rosado substantial quantities of stolen cards which Rosado redeemed through Perez, Torrez, and other co-defendants. (Tr. 159, 179, 423-24).

The Defense Case

Defendant Torrez did not testify or call any witnesses on his behalf.

Defendant Perez called one character witness who testified that he always found Perez to be an honest person. (Tr. 627). Perez also called a Spanish interpreter who had listened to copies of the tapes of the conversations between Perez and Rosado. He testified that he was unable to hear any conversation on one of the tapes. (Tr. 642-43).

The Government's Rebuttal Case

In its rebuttal case the Government played for the jury the original tape (GX 3) of the Spanish conversation which Perez's interpreter claimed was too unclear to discern. (Tr. 732). The Government then recalled Perez's interpreter who was in the courtroom when the original tape was played. He acknowledged that he could hear Spanish conversation on the original tape and could interpret into English some of the conversation. (Tr. 739-40).

ARGUMENT

POINT I

The Evidence Overwhelmingly Demonstrated the Defendants' Guilt.

Defendants Torrez and Perez make a variety of attacks on the sufficiency of the evidence. Torrez simply claims that the evidence against him was insufficient to sustain the conviction. Perez contends that the Government failed to establish that he acted with the requisite criminal intent and that the evidence was insufficient to

demonstrate an unlawful agreement or conspiracy to violate the law. These attacks on the jury's verdicts are wholly without merit. The defendants are simply urging upon this Court the same arguments as those which a properly instructed jury was compelled to reject.

Defendants are only able to marshal these arguments by disregarding the fundamental principle that, in reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Hawley*, Dkt. No. 76-1469, slip op. 3239, 3243 (2d Cir., April 27, 1977); *United States v. Leonird*, 524 F.2d 1076, 1081 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976). They similarly ignore the jury's right to credit the Government's witnesses. *United States v. Frank*, 494 F.2d 145, 153 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974); *United States v. Taylor*, 464 F.2d 240, 242-44 (2d Cir. 1972); *United States v. Simon*, 425 F.2d 796, 799 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970). When these principles are given due accord, it becomes apparent that the Government overwhelmingly demonstrated Torrez's and Perez's knowing participation in a massive scheme to defraud the United States food stamp program.

A. Defendant Torrez's Claim of Insufficiency Is Patently Without Merit

Torrez argues that the evidence merely showed that he was an employee who, in performing his job at a check cashing establishment, took some tips. Contrary to this claim, the evidence demonstrated that Torrez was a knowing and willing participant in this scheme. He exchanged "authorization to purchase" cards for food stamp coupons in quantities that had to alert him to the illicit nature of the transactions, since legitimate food stamps recipients

would not have possession of such cards in the quantities presented to him. His receipt of money for effecting this exchange evidenced his guilty knowledge and participation. Moreover, Torrez was informed by one accomplice that the cards Torrez was exchanging for coupons had been stolen.

Rosado testified that in 1976 he entered into an arrangement with Modesto Diaz wherein Diaz's check cashing establishments would illegally redeem stolen authorization to purchase cards obtained by Rosado. (Tr. 144-47). At some point (Rosado was unclear as to the date), he began to deliver the cards to Torrez, who operated Diaz's check cashier at 723 Burke Avenue, Bronx, New York (Tr. 158, 161). Rosado testified that over several months he brought cards to Torrez twice a month. On each occasion Torrez redeemed the cards for food stamp coupons, and frequently Rosado gave Torrez twenty to forty dollars for converting the stolen cards into coupons. (Tr. 170-77). By August 1976 Torrez was redeeming four to five hundred stolen cards twice a month for Rosado. (Tr. 188-91).

Since the jury had every right to credit Rosado's testimony, Torrez's conviction could be sustained on the basis of that testimony alone. The case against Torrez, however, did not rest simply on Rosado's testimony. Joseph Rivera testified that in 1975 he redeemed stolen cards directly through Torrez on approximately four occasions. Rivera stated that he paid Torrez three dollars for each card Torrez converted into food stamp coupons. Indeed, Rivera recalled telling Torrez that the cards were stolen.

In addition, the Government corroborated the testimony of Rosado through tape recordings, and the testimony of two agents from the United States Department

of Agriculture—William Burke and Charles Allen.* The tape recordings of Rosado's conversations with Torrez, and the transcripts prepared by expert translators were received in evidence. The FBI was amply justified in concluding that in those tape recorded conversations, Rosado and Torrez were discussing Torrez's illegal conversion of stolen authorization to purchase cards into food stamp coupons. (GX 3, 3(b), 7, 7(b), 8, 8(b)).**

United States Department of Agriculture Agent William Burke testified that he conducted surveillance of Rosado on several occasions after Rosado began to cooperate. Burke's testimony corroborated Rosado's testimony. Burke testified that on September 20, 1976 he gave to Rosado approximately 422 authorization to purchase cards, and that he saw Rosado enter a check cashier at 723 Burke Avenue, Bronx, New York. (Tr. 515). The cards that were given to Rosado were xeroxed and the xeroxed copies were retained by the Department of Agriculture. (GX 12; Tr. 544). Charles Allen, another Department of Agriculture agent, testified that in October 1976 he searched a warehouse where Manufacturer's Hanover Trust Company maintains redeemed authorization to purchase cards. Allen compared the cards obtained in his search (GX 12(a)) with the xerox copies

* Following Rosado's arrest, he agreed to cooperate with the investigation. He consented to continue his illegal business, but under the surveillance of Government agents; he further agreed to tape record his conversations. (Tr. 208-09).

** The tape recordings not only corroborated Rosado's incriminating testimony but demonstrated Torrez's guilty knowledge. One tape recording reveals Torrez talking to Rosado about placing "418 cards." (GX 3, 3(b)). Another tape shows Torrez telling Rosado that the coupons have been ready for hours (GX 7, 7(b)). In a third tape Torrez tells Rosado to bring \$11,012 in return for in excess of \$20,000 in food stamp coupons. (GX 7, GX 7(c)).

of the cards Burke gave to Rosado before Rosado entered Torrez's check cashier. Allen ascertained that many of the original cards (GX 12(a)) were identical to those in Government Exhibit 12. (Tr. 584-85). Each of the cards in Government Exhibit 12(a) were stamped *inter alia*, "Sep. 21, 1976, 723 Burke Avenue, Acct #027-21529." Obviously, these were the cards which Rosado had given to Torrez and which Torrez had redeemed.

Burke further corroborated Rosado's testimony when he testified that on September 27, 1976 he observed Rosado enter 723 Burke Avenue, Bronx, New York. Burke followed Rosado into the premises, and Burke identified the defendant Torrez as an individual he saw in the check cashing establishment. Burke left the establishment, and later met Rosado. Rosado turned over to Burke food stamp coupons with an approximate value of \$26,000. (GX 26; Tr. 532-36).^{*} The jury could not help but conclude that this enormous volume of food stamp coupons had been given to Rosado by Torrez in return for the hundreds of authorization to purchase cards Rosado had previously given to Torrez.

B. Perez's Claim of Insufficient Evidence To Establish His Unlawful Intent and Membership In the Conspiracy Is Similarly Without Merit

The evidence revealing that Perez knowingly and wilfully entered the conspiracy charged in Count One, and knowingly and wilfully committed the substantive offenses, was overwhelming. There could be no doubt but that

^{*} Burke's testimony clearly corroborated Rosado who had previously testified that on approximately September 20, 1976 he gave to Torrez about 400 cards which agent Burke had given to him (Tr. 214-15); and on September 27, 1976 Rosado gave to Torrez approximately \$11,000. (Tr. 225-26).

Perez acted with a bad purpose and an evil motive, and that his actions were voluntary and intentional, not the result of mistake or accident. *Morissette v. United States*, 342 U.S. 246, 265 (1952); *Screws v. United States*, 325 U.S. 91, 101 (1945); *United States v. Murdock*, 290 U.S. 389, 394 (1933); *United States v. Winston*, Dkt. No. 76-1436, slip op. 4445, 4449-50 (2d Cir., June 23, 1977). Accordingly, he acted knowingly and wilfully as Judge Wyatt properly defined those terms.*

On the issue of intent, the critical question was whether the defendant knew Rosado and Rivera were not in legitimate possession of the cards, and, therefore, were not entitled to receive the food stamp coupons.** Perez's counsel vigorously argued that Perez was simply doing his job as a check cashier redeeming authorization to purchase cards, and was unaware that Rosado had ac-

* Judge Wyatt's charge on intent was complete and accurate. The court instructed the jury that to convict the defendants on Count One (Tr. 960, 964), Two (Tr. 933), Four (Tr. 938), or Six (Tr. 947-50), the Government must prove that the defendant acted knowingly and or wilfully. The District Court unambiguously explained what the words, "knowingly" and "wilfully" meant in the context of the criminal law:

To do an act knowingly means to do it voluntarily and intentionally and not because of mistake or accident or other innocent reason.

To act wilfully means to act knowingly, deliberately and with a bad purpose and motive, but it is not necessary that a defendant know that he was breaking any particular law. (Tr. 934).

** Judge Wyatt crystallized for the jury the critical issue in the case:

Now, the question of intent was crucial also in connection with the substantive counts.

* * * * *

Intent in the context of this case involves primarily whether Torrez and Perez know that Rosado and Rivera were not entitled to buy food stamps with the ATP cards they presented. (Tr. 965, 966).

quired the cards illegally. He likened Perez to the bank teller or supermarket cashier who innocently receives a counterfeit bill from a customer. (Tr. 90, 93, 883-84, 890).

The jury was fully entitled to reject Perez's argument. His contention that the evidence inadequately demonstrated his guilty knowledge and intent is astounding. Indeed, it is difficult to comprehend how the jury could have failed to conclude that the defendant acted with the requisite intent.

The evidence demonstrated that Perez redeemed hundreds of authorization to purchase cards at a time for Rosado. Over the length of the conspiracy, Perez converted thousands of cards into food stamp coupons for Rosado and Rivera. On almost each occasion, Perez received thirty or forty dollars from Rosado for illegally redeeming the cards. Perez simply could not believe that Rosado had lawfully acquired hundreds of authorizations to purchase cards, since a legitimate recipient of food stamps would redeem only one card at a time. The inevitable conclusion was that Rivera knew that he was a vital link in a conspiracy to convert stolen cards into food stamp coupons.

Apart from the testimony of Rosado and Rivera,* Perez's intent was demonstrated by the tape recordings which showed that Perez knew that he was converting illegally obtained cards into food stamp coupons.

* Perez's brief is replete with argument to the effect that only Rosado testified to a particular event. In fact, both Rosado and Rivera testified to the events from which a finding of the requisite intent would be made. In any event it is the jury's province to evaluate credibility, see *United States v. Taylor, supra*, 464 F.2d at 242-44, and any appellate argument that the jury must reject a particular witness's testimony is to no avail.

The tape recording of a September 20, 1976 meeting between Rosado and Perez clearly reveals Rosado providing over seven hundred cards to Perez. (GX 3, 3(c)). The tape of the Rosado-Perez meeting on September 24, 1976 is replete with statements conclusively showing that Perez was acting with the requisite criminal intent. (GX 6, 6(b)).** A third tape recording of a Rosado-Perez telephone conversation unequivocally demonstrates Perez's knowing participation in the scheme. During that conversation, Perez and Rosado discuss the thirty thousand dollars transaction wherein Perez redeemed over seven hundred "authorization to purchase" cards for Rosado. (GX 9, 9(a)).

Perez advances two additional attacks on the sufficiency of the evidence. He contends that the evidence was insufficient to establish the existence of the conspiracy, and that the evidence was inadequate to support his convictions as an aider and abettor on Counts Two, Four and Six. Both claims are utterly specious. As we have amply demonstrated in the statement of facts and in this section of our brief, the accomplice and agent testimony, and the documentary evidence including the

* During the investigation but after Rosado was arrested and began to cooperate, the Government xeroxed the authorization to purchase cards before giving them to Rosado. While under surveillance, Rosado then gave the original cards to Perez who converted the cards into food stamp coupons. The Government retrieved the original cards and compared them with xeroxes. The comparison revealed that these were the identical cards Rosado had given to Perez, and that Perez had redeemed for Rosado. (GX 13, 13(a)).

** During the September 24, 1976 meeting, Perez informs Rosado that he cannot put the cards through the system immediately "because I've put a lot." Rosado tells Perez that Rosado will "settle the account on Monday or Tuesday," and Perez reiterates that he has many cards. Perez talks about \$30,000 in food stamp coupons. (GX 6, 6(b)).

tape recordings overwhelmingly proved an unlawful agreement by Rosado, Diaz, and Perez to violate the law.

Perez's aiding and abetting argument is equally unavailing. We initially observe that the jury was justified in convicting Perez on Count Two, unlawful transfer of food stamp coupons, and Count Four, theft of government property, as a principal. Indeed Judge Wyatt did not charge on aiding and abetting as to Count Two. As to Count Six, filing false claims with a department or agency of the United States, the Government did rely on the aiding and abetting statute. Judge Wyatt clearly instructed the jury that "the government contends that (Perez) aided and abetted Rosado and Rivera to present false claims through the banks." (Tr. 950). In transferring the food stamp coupons to Rosado, Perez aided and abetted Rosado in depositing the stamps in his bank account with the accompanying United States Department of Agriculture food stamp redemption certificate containing the false claim.*

* Since Judge Wyatt properly charged the jury in accordance with *Pinkerton v. United States*, 328 U.S. 640 (1946) (Tr. 968-70), the jury could have properly convicted Perez on Counts Two, Four and Six, if it found that Perez had entered the conspiracy, and another defendant committed the substantive offenses charged in Counts Two, Four, or Six in furtherance of the conspiracy. No exception was made to the *Pinkerton* charge, and any claim attacking the charge would be meritless. See *United States v. Corr*, 543 F.2d 1042, 1049-50 (2d Cir. 1976); *United States v. Finkelstein*, 526 F.2d 517, 522 (2d Cir. 1975), cert. denied, 425 U.S. 960 (1976).

POINT II**The District Court Properly Admitted Similar Act Evidence.**

Torrez claims that Judge Wyatt committed reversible error in receiving similar act evidence. This contention is without merit.

Prior to trial the Government furnished Torrez's counsel with copies of tape recorded conversations between Torrez and Rosado, and transcripts prepared by expert translators. The tapes and transcripts revealed that in addition to discussions about stolen "authorization to purchase" cards, Torrez and Rosado spoke about a counterfeit bill Rosado had given to Torrez and about a fraudulent money order scheme between Rosado and Torrez. Torrez objected to the admission of those portions of the tapes and transcripts relating to these two additional subjects. The Government had no objection to deleting all references to counterfeit bills, but argued that evidence of a fraudulent money order scheme between Torrez and Rosado was highly probative on the issue of intent. Judge Wyatt exercised his discretion and ruled that the similar act was admissible.

This Court has consistently held that evidence of other offenses is admissible if "it is relevant for some purpose other than merely to show a defendant's criminal character, provided that its potential for prejudicing the defendant does not outweigh its probative value." *United States v. Papadakis*, 510 F.2d 287, 294 (2d Cir.), cert. denied, 421 U.S. 950 (1975). See also *United States v. Chestnut*, 533 F.2d 40, 49 (2d Cir. 1976); *United States v. Torres*, 519 F.2d 723, 727 (2d Cir.), cert. denied, 423 U.S. 1019 (1975). The trial judge is granted wide discretion in weighing the probative worth of the proffered evidence against its impermissible prejudicial impact,

and that discretion will rarely be disturbed on appeal. *United States v. Rosenwasser*, 550 F.2d 806, 809 (2d Cir. 1977); *United States v. Rapoport*, 545 F.2d 802, 805 (2d Cir. 1976); *United States v. Natale*, 526 F.2d 1173-74 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976).

The Government offered the similar act testimony to show that the defendant acted wilfully and knowingly in converting the stolen cards into food stamp coupons, and not to show that the defendant had a criminal character. The disputed issue at trial was Torrez' knowledge and intent: Did he know that Rosado had secured the "authorization to purchase" cards illegally, and that Rosado had no lawful right to possess and transfer to Torrez the "authorization to purchase" cards?*

The similar act evidence demonstrated that Torrez provided Rosado with blank money orders. Torrez would record in his records that the money order was purchased for two dollars, and Rosado would then sell the money order for an amount in excess of two dollars. Rosado would give Torrez additional money for the blank money order. (Tr. 223-24). This evidence showed that at the same time Torrez was providing food stamp coupons to Rosado in exchange for stolen "authorization to pur-

* In a brief opening statement, Torrez' counsel made clear that intent and knowledge were the critical issues. He argued ... That is Mr. Torrez did absolutely nothing wrong.

He merely worked in a check cashing establishment . . . The evidence will show that Mr. Torrez at no time knew that any ATP cards were stolen from the mail. That Mr. Torrez at no time knew that anything illegal was happening. (Tr. 80).

In his summation Torrez's counsel argued that Torrez simply redeemed "authorization to purchase" cards which on their face were proper from an individual who would naturally have such cards because he was in the food business. (Tr. 846). Torrez was portrayed as a mere employee at a check cashier who simply did his job, having no knowledge of the impropriety of his actions. (Tr. 850).

chase" cards, he was also involved in a money order scheme with Rosado. This was compelling evidence to rebut Torrez's claim that he did not know that Rosado was redeeming illegally obtained cards. The jury had every right to consider the money order scheme as casting considerable doubt on Torrez' protestations that he did not know he was acting to further Rosado's illegal scheme. Such evidence, relevant on the issue of intent and knowledge, was properly received. See *United States v. Corr*, 543 F.2d 1042, 1053 (2d Cir. 1976); *United States v. Santiago*, 528 F.2d 1130 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976); *United States v. Leonard*, 524 F.2d 1076, 1091 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976).

Significantly, the evidence complained of could have had no impermissible prejudicial impact. We are not concerned with highly emotional evidence whose introduction could inflame a jury's passions against a defendant. Moreover, the District Court could properly conclude that a cautionary instruction would fully protect against the remote possibility that a jury would use the evidence for an improper purpose. Judge Wyatt's limiting instruction with respect to the similar act evidence was more than adequate. (Tr. 969). See *United States v. Chestnut*, *supra*, 533 F.2d at 50.

Finally, the similarity between the offense charged in the Indictment and the similar act is striking. During the same taped conversation in which Rosado provides Torrez with a substantial quantity of "authorization to purchase" cards, Torrez and Rosado discuss the money order scheme. In both schemes Torrez provides the vital link for Rosado in perpetrating his fraud; in one instance Torrez sells Rosado the food stamp coupons, and in the other Torrez sells Rosado the blank money order.

In sum, there can be no doubt but that the evidence was received for its proper probative purpose—to show Torrez's guilty knowledge and intent. Torrez has utterly

failed to demonstrate that Judge Wyatt abused his discretion in admitting the evidence.

POINT III

The District Court's Instructions Were In All Respects Proper.

Perez contends that the District Court failed to deliver a clear and precise charge to the jury. He specifically complains that the court did not instruct on "knowingly" and "wilfully" as to each offense, and did not adequately explicate the aiding and abetting offense. These claims are devoid of any merit.

Reading the charge as a whole, *Henderson v. Kibbe*, 45 U.S.L.W. 4457, 4460-61 (U.S. May 16, 1977); *United States v. Nemes*, Dkt. No. 76-1584, slip op. 3509, 3511 (2d Cir. May 16, 1977); *United States v. Guillette*, 547 F.2d 743 (2d Cir. 1976); *United States v. Magnano*, 543 F.2d 431 (2d Cir. 1976), it is clear that Judge Wyatt's charge was "clear, accurate, complete and comprehen-

* Perez' attorney offered the following compliments after Judge Wyatt completed his charge:

If your Honor will permit, I would like to explain some of my exceptions, and I must say that this charge, although it took over two hours, I think that the jury was very attentive and paid attention to it. It is a credit to your Honor. It was a very difficult area. In fact I can see your Honor did some research over the weekend, I think taught all the lawyers a little bit more about this case.

* * * * *

... but I think the record should, again, be explicit if this case does ever go up, that despite the fact that I have made these exceptions, I still stand by my original comments that I think that your Honor did an excellent job considering the time involved in the charge. (Tr. 980, 987).

sible.”* *United States v. Clark*, 475 F. 240, 248 (2d Cir. 1973). In fact, it is difficult to comprehend the arguments advanced by Perez on the aiding and abetting charge since Perez’ counsel, following the charge, stated that “I felt the aiding and abetting was a very good charge.” (Tr. 984). Even now, Perez fails to specify his objection to the aiding and abetting charge and, in any event, a reading of the charge clearly demonstrates its correctness. (Tr. 941-43). Judge Wyatt gave the traditional language and diligently conveyed this Court’s admonition that mere knowledge that a crime is being committed is not enough to make one an aider and abettor. See *United States v. Erb*, 543 F.2d 438, 446-47 (2d Cir. 1976).*

Perez does not contend that Judge Wyatt’s instructions relating to the element of “knowingly” and “wilfully” were in error. Instead he offers the fanciful argument that after explaining the terms fully, the court committed reversible error by failing to repeat the definitions when he charged the jury on each offense. Perez cites no authority requiring a district judge mechanically to reiterate definitions of previously defined terms, nor does it make sense to suggest that district judges should lengthen and complicate their charges by repeating matters previously explained.

Judge Wyatt utilized a sensible approach of instructing the jury that the words “knowingly” and “wilfully” appear frequently in the instructions and defining the words at the outset. (Tr. 934). When he subse-

* Since Perez did not object to the Court’s aiding and abetting charge at the trial, he cannot be heard to complain for the first time on appeal. See Fed.R.Crim.P.30; *United States v. Martinez*, Dkt. No. 77-1041, slip op. 4315, 4329 (2d Cir. June 21, 1977); *United States v. Bianco*, 534 F.2d 501, 507 (2d Cir. 1976); *United States v. Indiviglio*, 352 F.2d 276, 277 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 907 (1966).

quently charged the elements of each offense, he explained that the jury had to find beyond a reasonable doubt that the defendant acted knowingly or wilfully, (Tr. 938, 946-47), reminding the jury that he had defined those terms earlier in his charge. (Tr. 940, 948, 951-52, 964, 970). Finally, in the latter portion of the charge, the district judge explained that in considering whether the defendants acted knowingly and wilfully, "you will find that we enter what the law calls intent," (Tr. 964), and emphasized that intent was the crucial issue in the case. (Tr. 965). After the District Court's charge, Perez's counsel agreed that the court had made it clear that the knowingly and wilfully requirement applied to each count. (Tr. 983).

In sum, there is nothing to suggest that Judge Wyatt's charge failed to explicate fully the elements of the offense. See *United States v. Dixon*, 536 F.2d 1388, 1397 (2d Cir. 1976); *United States v. Howard*, 506 F.2d 1131 (2d Cir. 1974).*

* In the section of Perez's brief attacking the jury instructions, he complains that Judge Wyatt impermissibly read the indictment to the jury prior to the commencement of opening statements. Prior to reading the indictment, Judge Wyatt clearly warned the jury that the indictment is not evidence, (Tr. 22), and this admonition was repeated during the formal charge to the jury. (Tr. 921).

CONCLUSION

The judgments of convictions should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

RICHARD WEINBERG,
AUDREY STRAUSS,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Lawrence Taron, being duly sworn
deposes and says that is employed in the office of
the United States Attorney for the Southern District of
New York.

Stating also that on the 22nd day of July 1977
he served two copies of the within brief

by placing the same in a properly postpaid franked envelope
addressed:

1) Martin Gotkin, Esq.
250 West 57th St.
New York, New York 10019

2) Stuart Shaw, Esq.
600 Madison Avenue
New York, New York 10022

And deponent further says that sealed the said envelope
and placed the same in the mailbox for mailing at the
United States Courthouse Annex, One St. Andrew's Plaza,
Foley Square, Borough of Manhattan, City of New York.

Lawrence Taron

Sworn to before me this

22nd day of July, 1977

Maria A. Israelian
MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-452185i
Qualified in New York County
Term Expires March 30, 1978